Supreme Court, U.S.
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No. 86-107

In The

Supreme Court of the United States

October Term, 1986

MOBILE DODGE, INC.,

Appellant,

v.

DANNY R. ALFORD,

Appellee.

On Appeal From The Supreme Court Of Alabama

MOTION TO DISMISS

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QUESTION PRESENTED

Whether federal claims which were not presented to the Supreme Court of Alabama until an application for rehearing, which were not presented in accordance with established State practice, and were not sought to be reviewed, were not timely or properly raised, and were not expressly passed on by that Court, are within this Court's jurisdiction.

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MOBILE DODGE, INC.,

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Of Alabama

MOTION TO DISMISS

Pursuant to Rule 16.1(b) of the Rules of the Supreme Court of the United States, Appellee Danny R. Alford (herein referred to as "Alford") moves to dismiss this appeal on the ground that the federal questions sought to be reviewed were not timely or properly raised, and were not expressly passed on under Rule 16.1(b).

STATEMENT OF THE CASE

On February 14, 1986, in an exhaustive and well reasoned Opinion the Supreme Court of Alabama unanimously affirmed the Judgement of the Circuit Court of

Mobile County, Alabama pursuant to a jury verdict in the amount of $125,000.00 in favor of Alford and against the Appellant Mobile Dodge, Inc., (herein referred to as "Mobile Dodge"). Up until that time Mobile Dodge had never expressly or impliedly raised the constitutional issues which it raises upon this appeal. Mobile Dodge had not raised these issues in its Motion to Dismiss any Causes of Action of the Complaint, it had not raised such issues in its Motion for Directed Verdict at the close of Alford's case in chief or at the close of all of the evidence, it had not raised such issues in its post-trial Motion for Judgement Notwithstanding the Verdict, or in the Alternative, For New Trial and/or Remittitur as required by Rule 59 Ala. R. Civ. P. and most importantly it had not presented such issues in its "Statement of Issues Presented for Review" on its appeal to the Supreme Court of Alabama as required by Rule 28(a)(3) of the Alabama Rules of Appellate Procedure. Jurisdictional Statement 6a-7a. Appendix A, p. App. 1.

The first and only time Mobile Dodge attempted to raise the unconstitutionality of Section 12-22-72, *Code of Alabama 1975*, automatically imposing a penalty of ten percent on any money Judgement upon an unsuccessful Defendant-Appellee under the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States and the validity of the punitive damage award under the Excessive Fines Clause of the Eighth Amendment of the Constitution of the United States was in Mobile Dodge's Application for Rehearing to the Supreme Court of Alabama under Rule 40 of the Alabama Rules of Appellate Procedure.

Under Rule 44 of the Alabama Rules of Appellate Procedure, it is required that if the validity of any statute is raised in an Appellate Court of the State of Alabama and the governmental body which enacted the statute is not a party to the proceeding the party raising such questions shall serve a copy of his written brief on the Attorney General of the State of Alabama clearly setting out the questions raised. Appendix B, p. App. 2. Rule 44(b) requires that "A certificate of service shall be included in the brief of the party raising such question". Rule 44(d) states:

> [t]he appellate court will not rule until the notice contemplated by this rule has been given to the appropriate governmental body ....

Mobile Dodge's Brief served upon counsel for Alford and as filed with the Supreme Court of Alabama did not contain the required certificate of service upon the Attorney General of the State of Alabama in violation of Rule 44. After this appeal was filed with this Court and by letter dated August 4, 1986 counsel for Mobile Dodge for the first time served upon counsel for Alford a second certificate of service purportedly filed and received by the Attorney General of Alabama. Appendix C, p. App. 3, 4, 5 and 6. Appendix D, App. p. 7 and 8 is a copy of the only certificate of service served upon Alford or filed in the Supreme Court of Alabama before this appeal. The record will reflect that the brief of Mobile Dodge filed with the Alabama Supreme Court on Application for Rehearing did not contain this second certificate of service upon the Attorney General of Alabama. Alford raised the failure of Mobile Dodge to serve a copy of its Application for Rehearing upon the Attorney General of the State of Alabama as required by Rule 44 of the Alabama

Rules of Appellate Procedure in its Reply Brief to Mobile Dodge's Application for Rehearing. The Alabama Supreme Court had no knowledge of and no way to know of Mobile Dodge's apparent delivery of its Application for Rehearing to the Attorney General. The Supreme Court of Alabama would not rule upon the constitutionality of Section 12-22-72 *Code of Alabama 1975* under Rule 44(d) since the proper notice was not shown by the record to have been given to the Attorney General of Alabama. A copy of the first page and the portion of page 17 of Alford's Brief in Reply to the Application for Rehearing pointing this fatal procedural defect out to the Supreme Court of Alabama is included in Appendix E, p. App. 8.

Mobile Dodge's Application for Rehearing was overruled without either federal question being properly raised and without either being "expressly passed on" by the Supreme Court of Alabama as required by Rule 16.1(b) of the Rules of the Supreme Court of the United States. Jurisdictional Statement 14a-15a.

A. FACTS RELEVANT TO THE CONSTITUTIONAL QUESTIONS PRESENTED.

Mobile Dodge, in its Jurisdictional Statement at page 4, has set forth facts which it alleges are relevant to the constitutional questions presented. These are not the facts as set out in the Opinion of the Alabama Supreme Court. The correct facts are fully outlined in the Supreme Court of Alabama's Opinion at 487 So.2d 866 (Ala. 1986). Jurisdictional Statement 1a-13a. A brief synopsis of the facts is as follows.

The 1978 Chevrolet Corvette sold by Mobile Dodge to Alford was represented to Alford as having not been

wrecked and being in excellent condition. The Corvette was in fact two separate automobiles pieced together to make one. One automobile, sometimes referred to as VIN 4708, had been stolen while in transit from Louisville, Kentucky, and the other automobile, VIN 9392, had been totalled in Texas and sold for salvage. The condition of the Corvette sold to Alford was so bad that the Alabama Supreme Court referred to it as subjecting Alford, the passengers and guests in the Corvette, and the general public to "substantial risks of bodily harm and even death". Jurisdictional Statement 13a. Mobile Dodge not only knew that the Corvette had a Texas Salvage Title but that the Corvette was really two automobiles put together to make one. The Corvette also had serious rust problems which indicated that it had been under water. The Corvette was examined by Mobile Dodge prior to its sale to Alford by Kenneth Shereck, a Corvette expert employed by Mobile Dodge. Shereck had repaired and resold twenty damaged Corvettes himself. Shereck made a detailed physical examination of the Corvette when it was brought to Mobile Dodge by the previous owner Allison. Shereck saw that the Corvette had been repainted and in fact asked Allison had the Corvette been "in serious trouble" and had it ever had any "body work" done. Shereck noticed the Corvette had overspray on it which indicated it had been repainted and noticed a musty smell, evidence of the Corvette being under water. An incorrect brake pedal on the Corvette was obvious on examination and indicated the transmission was incorrect and "something was wrong". Shereck decided in his own mind to wholesale the car in order "to avoid lawsuits" and because he had decided that the Corvette was a "dog". Over Shereck's objection Morey Hider, the owner of Mobile Dodge, or-

dered Shereck to clean up the Corvette and retail it to the public rather than selling it at wholesale. The salesman, George Gonzales, described the car as "a piece of trash" that "you don't sell to the public . . . ." Gonzales described a wholesale car as a "piece of junk". Both Gonzales and Shereck, agents of Mobile Dodge, knew that different VIN numbers on the Corvette meant that it had been wrecked and that somebody had rebuilt the car. Four days after Hider ordered Shereck to clean up the Corvette and retail it to the public it was sold to Alford. Prior to Alford's purchase, Mobile Dodge had called the Alabama Department of Revenue Salvage Unit to find out about Allison's Title and thus knew of Allison's Salvage Title.

Contrary to Mobile Dodge's Statement of Facts in its Jurisdictional Statement at page 5, Alford never got Title to the Corvette. After this suit was filed and on February 2, 1983, Alford received a Certificate of Title to VIN 9392. However, most of what Alford physically received was from the stolen VIN 4708 and as pointed out by the Alabama Supreme Court one cannot receive a good title to a stolen vehicle. Jurisdictional Statement 9a-10a. The utterly gross conduct of Mobile Dodge is further sufficiently and succinctly detailed in the Alabama Supreme Court's Opinion set forth in the Appendix to the Jurisdictional Statement 1a-15a.

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ARGUMENT

1. THE FEDERAL ISSUES WERE NEITHER PROPERLY PRESENTED TO NOR CONSIDERED BY THE SUPREME COURT OF ALABAMA.

This Court has laid down the general rule that "[q]uestions first presented to the highest State court on a petition for rehearing come too late for consideration" here. *Radio Station WOW, Inc., v. Johnson,* 326 U.S. 120, 128 (1945); 16 C. Wright, A Miller, E. Cooper & E. Gressman, Federal Practice and Procedure, § 4022 at 701 (1977).

The Alabama appellate courts are firmly committed to the rule that new questions may not be presented to them for the first time on rehearing. In *Kirkland v. Kirkland,* 281 Ala. 42, 198 So.2d 771, 777 (1967), the Supreme Court of Alabama held:

> We cannot sanction the practice of bringing up new questions for the first time in application for rehearing. *Robinson v. Allison,* 97 Ala. 596, 604, 12 So. 382, 604 [sic].
>
> An application for rehearing on ground not argued or suggested until after our judgment was rendered cannot now be considered.

In *Lovett v. Uptain,* 450 So.2d 113, 116 (Ala. Civ. App. 1983), *aff'd sub nom. Ex parte Lovett,* 450 So.2d 116, 118 (Ala. 1984), the court stated:

> After an opinion has been rendered by an appellate court, consideration may not be given on rehearing to issues which were not argued nor suggested upon the initial submission of the case.

See, *Green v. First National Bank of Tuscaloosa,* 49 Ala. App. 426, 272 So.2d 895, 901 (1971), *rev'd on other*

grounds, 290 Ala. 14, 272 So.2d 901 (1972); *Alabama Farm Bureau Mutual Casualty Insurance Co. v. Anderson*, 48 Ala. App. 172, 263 So.2d 149 (1972), *cert. denied*, 288 Ala. 538, 263 So.2d 155 (1972); *Putnam v. City of Huntsville*, 48 Ala. App. 33, 261 So.2d 754 (1972). This rule is but an extension of the general Alabama rule against raising new issues for the first time on appeal. In *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n. 3 (1983), this Court noted that "[t]he general practice of the Alabama appellate courts is not to consider issues raised for the first time on appeal."[1]

The Supreme Court of Alabama has specifically refused to hear arguments upon new *constitutional* issues raised for the first time on rehearing. See *Cooper v. State*, 226 Ala. 288, 147 So. 432 (1933); *State v. City of Birmingham*, 160 Ala. 196, 48 So. 843 (1909).[2]

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1. In *Orr v. Orr*, 440 U.S. 268 (1979), a constitutional claim was first presented on appeal, but was considered by the Supreme Court of Alabama without objection. At 440 U.S. 274, this Court noted:

> "This unexcused tardiness might well have constituted a procedural default under state law, and if Alabama had refused to hear [the] constitutional objection on that ground, we might have been without jurisdiction to consider it here."

This Court emphasized that its conclusion did not "preclude any other state, or even Alabama in another case," from concluding that the constitutional argument made in *Orr*, raised in the same manner, would be too late to be considered. *Id.* at 275, n. 4.

2. At page 8 of its jurisdictional statement, Mobile Dodge argues that there is some significance to the fact that the Alabama Supreme Court in this case *overruled* its application for rehearing, instead of *denying* the application. Overruling applications for rehearing upon grounds that a constitutional issue was first raised on rehearing is not inconsistent with Alabama's practice. See e.g., *Cooper v. State*, 226 Ala. 288, 147 So. 432 (1933).

In construing Section 25 of the Judiciary Act of 1789, the predecessor of 28 U.S.C. § 1257, Justice Story wrote:

> It has been uniformly held that to give this court jurisdiction, two things should have occurred and be apparent in the record: First, that some one of the questions stated in the section did arise in the court below; and second, that a decision was actually made thereon by the same court . . . .

Crowell v. Randell, 35 U.S. (10 Pet.) 368, 390 (1836). Where the highest state court does not address a federal question, this Court assumes that the omission was caused by the lack of proper presentation. *Exxon Corp. v. Eagerton, supra,* 462 U.S. at 181 n. 3. And even if a state court passes on some questions raised on rehearing, federal questions also then raised but not passed upon may not be presented in this Court. *Fullerton v. Texas,* 196 U.S. 192 (1905).

In *Cardinale v. State of Louisiana,* 394 U.S. 437 (1969) this Court stated the rule:

> It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions. In *Crowell v. Randell,* 10 Pet. 368, 9 L.Ed. 458 (1836), Justice Story reviewed the earlier cases commencing with *Owings v. Norwood's Lessee,* 5 *Cranch* 344, 3 L.Ed. 120 (1809), and came to the conclusion that the Judiciary Act of 1789, c.20, § 25, 1 Stat. 85, vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. 'If both of these do not appear on the record, the appellate jurisdiction fails.' 10 Pet. 368, 391, 9 L.Ed. 458, 467. The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions both before the *Crowell* opinion, 394 U.S. 438.

The Court explained its rationale:

> In addition to the question of jurisdiction arising under the statute controlling our power to review final judgments of state courts, 28 U.S.C. § 1257, there are sound reasons for this. Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground. Even though States are not free to avoid constitutional issues on inadequate state grounds.

With regard to first raising federal questions upon an application for rehearing, this Court has rejected such arguments in *Herndon v. Georgia*, 395 U.S. 441 (1934). There this Court held that it was without jurisdiction because "no federal question was seasonably raised in the court below or passed upon by that court". This Court rejected jurisdiction even though it noted that there was a,

> [p]reliminary attack upon the indictment in the trial court on the ground, among others, that the statute was in violation 'of the Constitution of the United States,' and that this contention was overruled.

See, 295 U.S. 441, 443.

However, this Court stated at 295 U.S. 443,

> But, in addition to the insufficiency of the specification, the adverse action of the trial court was not preserved by exceptions *pendente lite* or assigned as error in due time in the bill of exceptions, as the settled rules of the state practice require.

With reference to the attempt to raise the federal question after Judgment upon a petition for rehearing, this Court held that, unless the lower court actually entertains *and decides* the question. it is raised too late.

This Court stated at 295 U.S. 443,

> The federal question was never properly presented to the state supreme court unless upon motion for rehearing; and that court then refused to consider it. The long-established general rule is that the attempt to raise a federal question after judgment, upon a petition for rehearing. comes too late, unless the court actually entertains the question and decides it.

Mobile Dodge's reference in its Jurisdictional Statement at pages 10 and 11 to the existence of one phrase appearing on page 49 of a 52 page brief making a passing reference to "the resemblance of punitive damages to criminal sanctions" is even less of a challenge than the preliminary attack on the indictment held insufficient by this Court in *Herndon v. Georgia, supra.*

Mobile Dodge recognizes in its Jurisdictional Statement at page 7, that it bears a heavy burden to persuade this Court of its jurisdiction in the admitted absence of any express reference in the Opinion of the court below to the federal constitutional provisions relied upon by Mobile Dodge here. Mobile Dodge cites for this proposition this Court's decision is *Illinois v. Gates,* 472 U.S. 213 (1983).

As noted by this Court in *Gates, supra,* which quoted from this Court's decision in *McGoldrick v. Compagnie Generale Transatlantique,* 309 U.S. 430 (1940), at page 434, this burden is extremely heavy.

> But it is also the settled practice of this Court, in the exercise of its appellate jurisdiction, that it is *only in exceptional cases*, and then only in cases coming from the federal courts, that it considers questions urged by a petitioner or appellant not pressed or passed upon in the courts below . . . . In cases coming here from state courts in which a state statute is assailed as unconstitutional, there are reasons of peculiar force which should lead us to refrain from deciding questions not presented or decided in the highest court of the state whose judicial action we are called upon to review. Apart from the reluctance with which every court should proceed to set aside legislation as unconstitutional on grounds not properly presented, due regard for the appropriate relationship of this Court to state courts requires us to decline to consider and decide questions affecting the validity of state statutes not urged or considered there. It is for these reasons that this Court, where the constitutionality of a statute has been upheld in the state court, consistently refuses to consider any grounds of attack not raised or decided in that court. (Emphasis added.)

This Court in *Gates, supra,* noted that there are very good reasons for this Court's rule. At 462 U.S. 213, 221, the Court noted one reason as follows:

> [q]uestions not raised below are those on which the record is very likely to be inadequate since it certainly was not compiled with those questions in mind.

A second important reason, the notion of "comity" or a proper respect for the functions of state judicial institutions, was noted by this Court in *Gates, supra,* at page 221:

> Likewise, 'due regard for the appropriate relationship of this Court to state courts,' citing case, ... demands that those courts be given an opportunity to consider the constitutionality of the actions of state

> officials, and, equally important, proposed changes in existing remedies for unconstitutional actions.

Lastly, the Court in *Gates, supra,* noted at 462 U.S. 213, 224 that, "weighty prudential considerations" militate against considering questions not previously passed upon by state courts. Describing this last consideration the Court in *Gates* stated,

> Where difficult issues of great public importance are involved, there are strong reasons to adhere scrupulously to the customary limitations on our discretion. By doing so we 'promote respect . . . for the Court's adjudicatory process [and] the stability of [our] decisions.' *Mapp v. Ohio, supra,* 367 U.S., at 677, 6 L.Ed.2d 1081, 81 S.Ct. 1684, 16 Ohio Ops. 2d 384, 86 Ohio L. Abs. 513, 84 ALR.2d 933 (Harlan, J., dissenting). Moreover, fidelity to the rule guarantees that a factual record will be available to us, thereby discouraging the framing of broad rules, seemingly sensible on one set of facts, which may prove ill-considered in other circumstances. In Justice Harlan's words, adherence to the rule lessens the threat of "untoward practical ramifications," id., at 676, 6 L.Ed.2d 1081, 81 S.Ct. 1684, 16 Ohio Ops. 2d 384, 86 Ohio L. Abs. 513, 84 ALR.2d 933 (dissenting opinion), not foreseen at the time of decision. The public importance of our decisions in Weeks and Mapp and the emotions engendered by the debate surrounding these decisions counsel that we meticulously observe our customary procedural rules. By following this course, we promote respect for the procedures by which our decisions are rendered, as well as confidence in the stability of prior decisions. A wise exercise of the powers confided in this Court dictates that we reserve for another day the question whether the exclusionary rule should be modified.

Mobile Dodge's failure to raise either federal question presented in the Jurisdictional Statement at any point

during these proceedings until its Application for Rehearing violates Rule 16.1(b) of the Rules of the Supreme Court requiring that federal questions be both timely and properly raised in the court below and expressly passed on by the court below. Here, neither condition is met. Even if this Court should decide that the raising of such issues in Mobile Dodge's Application for Rehearing was a timely and proper method of raising such issues in the Supreme Court of Alabama, such issues were not expressly passed upon by the Supreme Court of Alabama and this Court's jurisdiction must fail for that reason alone. *Herndon v. Georgia, supra* at page 10.

Mobile Dodge chose all of the issues to be decided by the Supreme Court of Alabama in its appeal. These issues are set forth by the Alabama Supreme Court in its opinion. Jurisdictional Statement page 7a. Whether the failure of Mobile Dodge to present the federal questions is due to neglect or some other reason is irrelevant. No excuse whatsoever is even offered by Mobile Dodge for its failure to present to the Supreme Court of Alabama Question 2 pertaining to the Excess Fines Clause of the Eighth Amendment. As will be seen below, Question 1 pertaining to the mandatory ten percent affirmance should have been but was not presented to the Supreme Court of Alabama in Mobile Dodge's initial appeal to that court.

A. THE CONSTITUTIONALITY OF SECTION 12-22-72 WAS NOT TIMELY AND PROPERLY RAISED.

Mobile Dodge asserts, at pages 7, 8 and 9 of its Jurisdictional Statement, that waiting until the decision was against it and then filing an Application for Rehearing

was the "logical time" to present a challenge to the non-discretionary imposition by the court of the ten percent penalty. If, as is admitted by Mobile Dodge, the ten percent penalty is non-discretionary, Mobile Dodge knew beforehand that in the event its appeal was lost that the non-discretionary penalty would be imposed. Thus, Mobile Dodge's excuse for waiting until after it lost the appeal to raise the non-discretionary imposition of the ten percent penalty is not logical. This is unlike *Burlington Northern Railroad Company v. Woods*, 768 F.2d 1287 (11th Cir. 1985) No. 85-1088 (*cert. granted* March 24, 1986) where a post-judgment motion for assessment penalty was filed and granted by the Eleventh Circuit.

Mobile Dodge asserts that since its Application for Rehearing was "overruled" rather than "denied" that this means that the Alabama Supreme Court "implicitly" upheld the constitutionality of Sectnon 12-22-72 thereto and that their action was "presumptively" not based upon lack of proper presentation of the question. These statements by Mobile Dodge are strictly speculation as to the meaning of the words "denied" versus "overruled" to the Alabama Supreme Court. Neither *Ham v. Harrington*, 278 Ala. 521, 179 So.2d 154 (1965), *cert. denied*, 382 U.S. 981 (1966), nor *Thompson v. State*, 268 Ala. 483, 107 So.2d 890 (1959) cited as authority by Mobile Dodge had anything to do with this proposition. Mobile Dodge's Application for Rehearing was overruled without opinion. Such action does not rise to the level of the court having "passed upon" the issue for the purposes of this rule. As this Court stated in *Illinois v. Gates, supra*, "the routine restatement and application of settled law by an appellate court [does] not satisfy the 'not pressed or passed upon

below' rule." 462 U.S. at 222-23 (citing *Morrison v. Watson*, 154 U.S. 111 (1894).[3]

In fact, if one were to engage in speculation as Mobile Dodge does in its Jurisdictional Statement, one would speculate that overruling Mobile Dodge's Application for Rehearing could presumptively be because of lack of proper presentation. Rule 44(a) of the Alabama Rules of Appellate Procedure specifically mandates that when any state statute is challenged because of its alleged unconstitutionality "the party raising such question [Mobile Dodge] shall serve a copy of his written brief, which shall clearly set out the question raised, on the Attorney General . . . ." Rule 44(b) further states, "A certificate of service [on the Attorney General] shall be included in *the brief* of the party raising such question." (Emphasis added.) In this case, Mobile Dodge did not include in its filed certificate of service the fact that it had served the Attorney General of the State of Alabama. The Supreme Court of Alabama would naturally conclude by looking at the filed Application for Rehearing that Rule 44 was not complied with due to Mobile Dodge's failure to serve the Attorney General with a copy of the Application for Rehearing. In fact, this fatal defect in Mobile Dodge's Applica-

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3. Mobile Dodge's challenge to Section 12-22-72 is raised in a manner indistinguishable from the challenge to the same statute raised by petitioner in *Illinois Central Gulf Railroad Co. v. Evan D. Coleman*, No. 85-695 (*cert. denied* May 5, 1986) where this Court denied the Petition for Writ of Certiorari in the face of a Supreme Court of Alabama decision which did not address the merits of a constitutional challenge to Section 12-22-72. This Court necessarily recognized the logic and practice of denying challenges to the constitutionality of Section 12-22-72 which were not properly and timely raised and passed upon by the Alabama Supreme Court.

tion for Rehearing to the Supreme Court of Alabama was pointed out by Alford in his Reply Brief to the Application for Rehearing. Appendix E, p. App. 8. Mobile Dodge apparently has tried to correct its fatal error by letter to counsel for Alford dated August 4, 1986 enclosing for the first time a second certificate of service allegedly served upon the Attorney General of Alabama. Appendix C, p. App. 3, 4, 5 and 6. Regardless of whether or not as the letter asserts Mobile Dodge did in fact serve a copy of the Application for Rehearing on the Attorney General, the Alabama Supreme Court would not have known of this fact since this second certificate of service was never filed with the court. Thus, the logical conclusion would be that the Alabama Supreme Court agreed, as pointed out by Alford, that Rule 44 had been violated by Mobile Dodge's failure to serve the Application for Rehearing upon the Attorney General, and thus under its Rule 44(d) it could not procedurally hear the constitutional issue raised by the Application for Rehearing. On these facts one could thus presume that the Alabama Supreme Court overruled the Application for Rehearing because of Mobile Dodge's failure to comply with Rule 44.

From the above it is clear that Mobile Dodge did not timely or properly raise the federal questions presented here for review and it is clear that they were not expressly passed on as required by Rule 16.1(b).

B. THE FEDERAL CONSTITUTIONAL CHALLENGE TO THE EXCESSIVENESS OF THE PUNITIVE DAMAGE AWARD WAS NOT TIMELY OR PROPERLY RAISED.

Mobile Dodge contends that the alleged excessiveness of the punitive damage award was first challenged on No-

vember 23, 1983 in its post-trial Motion for Judgment Notwithstanding the Verdict, or in the Alternative, For New Trial and/or Remittitur.[4] A review of the Motion expressly shows that no constitutional challenge whatsoever was presented in the Motion, no mention was made of the Excessive Fines Clause of the Eighth Amendment, no mention was made of the Due Process Clause of the Fourteenth Amendment, and no mention was made of the Equal Protection Clause of the Fourteenth Amendment. Neither was Question 2 raised in any manner whatsoever in Mobile Dodge's brief filed with the Supreme Court of Alabama on its direct appeal June 14, 1984. The only four issues chosen to be raised by Mobile Dodge in its appeal were those issues stated in the Opinion of the Supreme Court of Alabama. Jurisdictional Statement 7a. Like the Motion for Judgement Notwithstanding the Verdict, or in the Alternative, For a New Trial and/or Remittitur, Mobile Dodge's brief did not present any constitutional challenge whatsoever to the imposition of punitive damages. Mobile Dodge's contention in its initial brief was that the *amount* of punitive damages was "excessive", not that the award of punitive damages would be unconstitutional. Mobile Dodge admits in their Jurisdictional Statement at page 11, that "for the first time" Mobile Dodge relied upon the Excessive Fines Clause of the Eighth Amendment of the Due Process Clause of the Fourteenth Amendment in its Application for Rehearing. This admission in the Jurisdictional Statement alone would justify a

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4. Mobile Dodge's Motion in this regard has been lodged with the Clerk of this Court in connection with the docketing of this appeal as per Mobile Dodge's footnote 5, Jurisdictional Statement page 10.

granting of this Motion to Dismiss. *Herndon v. Georgia*, 295 U.S. 441 (1935).

By no stretch of the imagination could one consider the constitutional issues raised in the Application for Rehearing as an "enlargement" of any previous challenge made by Mobile Dodge. *Dewey v. Des Moines*, 173 U.S. 193 (1899) cited by Mobile Dodge as authority for the "enlargement of previous challenges" principle supports Alford's position here. In *Dewey*, the only constitutional question raised by the appellant in the court below in brief was that he had "no personal notice or knowledge of the assessment proceedings" and "the imposition of a personal liability against him in excess of the value of all lots was not due process of law, and was in contravention of the provisions upon that subject of the Fourteenth Amendment of the Constitution of the United States". In addition to this question Dewey attempted to raise in this Court that taxation of lots above their actual value constituted a taking of private property for public use without just compensation and without due process of law. This Court held that the second question could not be raised in this Court because it had not been previously raised in the Supreme Court of Iowa. This Court noted that the appellee made the same objection as Alford does here stating,

> It is objected on the part of the Defendant in error that, as this is a review of a judgment of a state court, this second question cannot be raised here, because it was not raised in the courts below and was not decided by either of them.
>
> Reference to the opinion of the Supreme Court of the State shows that it was not therein discussed or decided.

See, 173 U.S. 197.

It should be observed that even though the Due Process Clause was relevant to both questions attempted to be raised in this Court by Dewey that the second question was held not to be an "enlargement" of the first question. It is important that this Court referred to the "opinion" of the Supreme Court of Iowa to determine that the federal question attempted to be raised in this Court was "not therein discussed or decided."

This Court's rule is soundly based upon the principle that the lower state courts should be given a reasonable and adequate opportunity to first pass upon the merits of a constitutional challenge based upon a sufficient record and presentation of meaningful arguments. In no way can it be claimed by Mobile Dodge that the Alabama Supreme Court was ever given any kind of reasonable presentation of a record or argument on Question 2 in Mobile Dodge's appeal and, therefore, there is nothing upon which an "enlargement" argument can be based.

It has not been the practice of this Court throughout its history to formulate a record and decide issues for an appellant who wishes that it had properly raised issues in the courts below and then tries to get this Court to accept jurisdiction based upon issues inadequately presented below. The reason for Rule 16.1(b) is to give state courts a legitimate and ample opportunity to pass upon "expressly" raised federal issues. Rule 16 of the Rules of the Supreme Court and *Illinois v. Gates*, 462, U.S. 213 (1983). As pointed out previously there are sound judicial reasons for this rule. Not the least of these reasons is to allow the lower courts to formulate a proper record for a clear decision upon the issue. For instance, if the court below were called upon to decide the constitutional issues raised herein

it would be required to determine the exact amount of punitive damages versus the actual amount of compensatory damages. As the Alabama Supreme Court pointed out in its Opinion (Jurisdictional Statement 13a) "although this was a general verdict and *we do not know* what portion of the award would relate to compensatory damages, due to the enormity of the wrong in this case, we would affirm an award of $125,000.00 solely as punitive damages." (Emphasis added.) The Supreme Court of Alabama has already stated that it does not know the amount of the verdict related to punitive damages and it should not be called upon by this Court to do something which it has already said it is unable to do. Had Mobile Dodge pressed this point from the beginning of this case there would be a clear record as to what damages were compensatory and what damages were punitive. Because of Mobile Dodge's neglect the record is unclear on this point. Even Mobile Dodge speculates in its Jurisdictional Statement at page 18 upon the amount of punitive damages.

This Court has previously passed upon the issue presented here in an appeal attempted under 28 U.S.C. Section 1257(c) in *Exxon Corp. v. Eagerton,* 462 U.S. 176 (1983). There the appellant attempted to contend that the application of the pass-through prohibition to oil was preempted by the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. Section 1751. This Court concluded that it had no jurisdiction to consider the contention. This Court clearly set out the jurisdictional rule in footnote 3 of the opinion. 462 U.S. 176, 181. As here, the opinion of the Alabama Supreme Court did not discuss or consider the issue presented. This Court stated at 462 U.S. 181 with regard thereto as follows,

> The decision below does not discuss this issue, and when " 'the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.' " *Fuller v. Oregon,* 417 U.S. 40, 50, n. 11, 40 L.Ed.2d 642, 94 S.Ct. 2116 (1974), quoting *Street v. New York,* 394 U.S. 576, 582, 22 L.Ed.2d 572, 89 S.Ct. 1354 (1969). No such showing has been made here. Although appellants in No. 81-1268 have represented to this Court that the trial court held the pass-through prohibition to be preempted by the EPAA, Juris Statement at 3, an examination of the trial court opinion reveals that in fact the court made no mention of the EPAA. Nor does anything in the record before us indicate that this issue was raised in the trial court. Appellants did address the EPAA in their brief before the Supreme Court of Alabama, Brief for Appellees Exchange Oil and Gas Corp., Getty Oil Co., Placid Oil Co., Union Oil Co. of California in No. 79-823, pp 51-53, but that court did not pass on the issue. Under these circumstances we have no jurisdiction to consider whether the EPAA preempted the application of the pass-through prohibition to oil, for it does not affirmatively appear that that issue was decided below. *Bailey v. Anderson,* 326 U.S. 203, 206-207, 90 L.Ed. 3, 66 S.Ct. 66 (1945). The general practice of the Alabama appellate courts is not to consider issues raised for the first time on appeal.

Thus, this Court has already considered and consrtued Alabama's practice with regard to constitutional challenges raised for the first time on appeal. The rule that this Court has applied to Alabama decisions as stated in *Exxon Corp. v. Eagerton, supra,* is that jurisdiction will not be accepted under 28 U.S.C. 1257(2) if the Alabama Supreme Court has not been presented with and the ques

tion has not been expressly passed upon. Not only is this good law it is good sense.

Mobile Dodge has offered absolutely no excuse for not raising the constitutional issues in the trial court and as this Court observed in *Exxon Corp. v. Eagerton, supra,* the general practice of the Alabama appellate courts is not to consider issues raised for the first time on appeal. Although Mobile Dodge attempts to boot strap its Eighth Amendment and Due Process claims by asserting that it generally challenged the punitive damages award as excessive in its post trial motion and upon original submission on appeal, it candidly admits in its Jurisdictional Statement that those constitutional issues were "for the first time, expressly relied on" in its Application for Rehearing. Jurisdictional Statement page 11. Mobile Dodge likewise offers no excuse for not raising the Eighth Amendment and Due Process questions upon its original appeal to the Alabama Supreme Court.[5]

It is obvious from the way that Mobile Dodge handled the trial of this case, as well as its appeal to the Supreme Court of Alabama, that Mobile Dodge failed to present any constitutional questions until the Application for Rehearing. By that time the Alabama Supreme Court had completely, capably, and exhaustively dealt with all the issues raised by Mobile Dodge in its appeal to that court. The constitutional issues raised upon the Application for Rehearing were simply an afterthought which came to Mobile Dodge's attention at a later time.

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5. No claim of "surprise" under the doctrine of *Brinkerhoff-Faris Trust and Savings Co. v. Hill,* 281 U.S. 673 (1930) is suggested.

Hathorn v. Lovorn, 457 U.S. 255 (1982) and like cases to the contrary, notwithstanding, principles of sound judicial economy and comity, not to mention sound plain logic, compel a conclusion that this Court should refrain from reviewing federal issues which are belatedly and halfheartedly addressed to the state courts as an afterthought in violation of the established rules of those courts. This Court has fully and completely recognized this principle several times. In *Webb v. Webb*, 451 U.S. 493, 499 (1981), it said:

> It is appropriate to emphasize again . . . that there are powerful policy considerations underlying the statutory requirement and our own rule that the federal challenge to a state statute or other official act be presented first to the state courts. These considerations strongly indicate that we should apply this general principle with sufficient rigor to make reasonably certain that we entertain cases from state courts only where the record clearly shows that the federal issue as been properly raised below.
>
> In the first place, although the States are sovereign entities, they are bound along with their officials, including their judges, by the Constitution and the federal statutory law. Principles of comity in our federal system require that the state courts be afforded the opportunity to perform their duty, which includes responding to attacks on state authority based on the federal law, or, if the litigation is wholly private, construing and applying the applicable federal requirements.

Even if it is assumed that this Court has jurisdiction of this appeal as to the constitutionality of Section 12-22-72 (Question 1), it is clear that it does not have jurisdiction to decide the constitutional issues relating to the excessiveness of the punitive damage award and the Eighth Amendment (Question 2). *Dewey v. Des Moines, supra.*

———o———

CONCLUSION

This Court stated in *Aetna Life Ins. Co. v. Lavoie,* op. at 14, 106 S.Ct., at 1589 that the issues raised on this appeal were important issues "which, in an appropriate setting, must be resolved . . . ." It is submitted that the "appropriate setting" has not been presented by Mobile Dodge. This failure is illustrated by a similar case, *Illinois Central Gulf Railroad Co. v. Evan D. Coleman,* No. 85-695, in which the petition for certiorari was denied May 5, 1986. The constitutional issues Mobile Dodge attempts to present to this Court were never raised in the trial court and were never raised before the Supreme Court of Alabama until the Application for Rehearing. Rule 16.1(b) has been violated because the federal questions sought to be reviewed were not timely or properly raised and were not expressly passed on by the Alabama Supreme Court. Thus, the Motion to Dismiss this appeal should be granted.

Respectfully submitted,

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Attorney for Appellee

APPENDIX A

Alabama Rules of Appellate Procedure.

RULE 28

BRIEFS

(a) Brief of the Appellant. The brief of the appellant shall contain under appropriate headings and in the order here indicated:

* * *

(3) A statement of the issues presented for review with principal authorities of law supporting each issue presented;

APPENDIX B

Rules of Appellate Procedure

RULE 44

CONSTITUTIONAL QUESTIONS

(a) Service. If the validity of any statute, executive or administrative order, municipal ordinance, franchise or written directive of any governmental officer, agent or body is raised in the appellate court, and the State, municipal corporation or governmental body which enacted or promulgated such questioned order is not a party to the proceeding, the party raising such question shall serve a copy of his written brief, which shall clearly set out the question raised, on the Attorney General, the city attorney, or the chief legal officer of the governmental body whose order is questioned.

(b) Certificate of Service. A certificate of service shall be included in the brief of the party raising such question.

* * *

(d) Notice. Except by special order of the court, in the absence of such notice and certificate, the appellate court will not rule until the notice contemplated by this rule has been given to the appropriate governmental body and the said governmental body or chief legal officer has been given such opportunity to respond as shall be set by the court

APPENDIX C

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August 4, 1986

Vincent F. Kilborn, III, Esquire
Attorney at Law
Post Office Box 1904
Mobile, Alabama 36633

Re: Mobile Dodge, Inc.

vs

Danny R. Alford

Dear Vince:

As you know, Rule 44 of the Alabama Rules of Appellate Procedure requires that the office of the Attorney General be notified when any State statute is constitutionally challenged in a court of law. Rule 44 (b) requires that a certificate of service shall be included in the brief of the party raising such such constitutional challenge. Our Brief in Support of our Application for Rehearing to the Alabama Supreme Court contained such a challenge and, accordingly, I have enclosed a copy of the front page of such Brief as well as both pages of certificate of

service; one to you and the other notifying the Honorable Charles D. Graddick, Attorney General for the State of Alabama of our challenge by the filing of our Brief. You will note that the Office of the Attorney General certified that the Brief was received by the Office of the Attorney General on March 8th, 1986.

With best regards,

ENGEL, WALSH and ZOGHBY

/s/ Alex W. Zoghby

AWZ:tas

enclosure

cc: Mr. Morris Hider

Larry L. Sims, Esquire

IN THE SUPREME COURT OF ALABAMA

Case No. 84-1006

MOBILE DODGE, INC.,
a corporation,

Appellant,

vs.

DANNY R. ALFORD,

Appellee

APPEALED FROM THE JUDICIAL COURT FOR THE THIRTEENTH JUDICIAL COURT (MOBILE CIRCUIT COURT)

BRIEF OF MOBILE DODGE, INC., APPELLANT, IN SUPPORT OF ITS APPLICATION FOR REHEARING

ORAL ARGUMENT REQUESTED

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/s/ Mylan R. Engel

/s/ Alex W. Zoghby

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that I have on this the 7th day of March, 1986, served a copy of the foregoing on counsel for all parties concerned by mailing

the same by United States mail, properly addressed and first class postage prepaid.

/s/ Alex W. Zoghby

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that I have on this the 7th day of March, 1986, served a copy of the foregoing Brief of Mobile Dodge, Inc., Appellant, in Support of its Application for Rehearing on the Honorable Charles D. Graddick, Attorney General for the State of Alabama, by mailing the same by United States mail, properly addressed and first class postage prepair.

/s/ Alex W. Zoghby

July 30, 1986

I hereby certify that the above brief was received by the Office of the Attorney General on March 8, 1986.

/s/ Thomas R. Allison
Assistant Attorney General

APPENDIX D

IN THE SUPREME COURT OF ALABAMA

Case No. 84-1006

MOBILE DODGE, INC.,
a corporation,

Appellant,

vs

DANNY R. ALFORD,

Appellee.

APPEALED FROM THE JUDICIAL COURT FOR THE THIRTEENTH JUDICIAL COURT (MOBILE CIRCUIT COURT)

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ORAL ARGUMENT REQUESTED

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/s/ Alex W. Zoghby

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that I have on this the 7th day of March, 1986, served a copy of the foregoing on counsel for all parties concerned by mailing the same by United States mail, properly addressed and first class postage prepaid.

/s/ Alex W. Zoghby

APPENDIX E

IN THE SUPREME COURT OF ALABAMA

CASE NO. S.S. 84-1006

MOBILE DODGE, INC.,

Appellant,

vs.

DANNY R. ALFORD,

Appellee.

BRIEF OF APPELLEE IN OPPOSITION TO APPELLANT'S APPLICATION FOR REHEARING

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ISSUE IV

EQUAL PROTECTION ARGUMENT

Mobile Dodge finally argues at Section 12-22-72, imposing a ten percent (10%) affirmance penalty violates the Equal Protection Clause. As stated before, this issue was never raised during the trial of this case nor during this appeal. Under the cases previously cited this Court should not consider new issues raised upon an Application for Rehearing.

It should also be noted that where constitutional questions are raised involving the validity of a state statute Rule 44 of the Rules of Appellate Procedure must be followed. This rule includes notice provisions to the Attorney Geuneral of the State of Alabama. None of the requirements of Rule 44 have been met in this case.